# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 577 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? |
| 2 | To be referred to the Reporter or not ? |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? |
| 5 | Whether it is to be circulated to the civil judge ? |

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SANJAY SHRISAMBHUNATH SHAH - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MR BM GUPTA WITH MR DP KINARIWALA for Appellant.
MR KT DAVE, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 10/11/2006
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. The appellant – original accused, Shri Sanjay Shrisambhunath Shah has filed this appeal under Section 374 of the Code of Criminal Procedure ("Code" for short) challenging the correctness of the judgment and order dated 20.05.2000 in NDPS Case No. 04 of 1999 passed by the learned Sessions Judge, Vadodara. By the impugned judgment and order, the appellant has been convicted for the offences punishable under Section 8 (c), 20 (b) read with Section 21 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (hereinafter referred to as "the NDPS Act") and was ordered to suffer rigorous imprisonment for a period of 10 years and fine of Rs. 1 Lacs and in default thereof, to undergo S.I of one year.

2. The brief facts as per the prosecution and as disclosed from the complaint as well as unfolded during trial, is as under :-

3. On 02.01.1999, Head Constable Gambhirsinh Javrajsinh, PW – 10 along with Head Constables Hasan Mohmmed Vali Mohmmed, Bhailalbhai Vitthalbhai and PI, Western Railway were in round on the railway platform of Vadodara railway station and when they reached to platform No. 5, they saw the accused sitting on a bench along with a small black coloured attache. On seeing the police personnels, he immediately stood up from the bench and moved fastly. He was suspected by the police personnels and head constable Gambhirsinh and Hasan Mohmmed have stopped him and asked about the contents of the attache. The accused seemed to have been afraid of and could not give any satisfactory explanation. These police personnels have, therefore, asked him to come to Vadodara railway police station. Two panch witnesses have

been called from the platform itself to the police station. The police personnels have asked the panch witnesses to search the police personnels and the complainant. However, they have not expressed their desire to take the search. Panchas as well as police personnels have taken search amongst themselves and since nothing incriminating was found from them, the accused was asked about his name and address. Thereafter, the accused was asked to handover the key of the attache but he said that the key was lost at the railway station. The attache was thereafter got opened by using screw driver and it was found from the attache an old white coloured lungi as well as a blue coloured pent and beneath that pent, there was a plastic bag wherein four brownish coloured slices were found and on smelling the same, it was felt that the said article was *charas*. The accused was informed that the same was narcotic drug and keeping this articles in the attache, he has committed an offence under the NDPS Act. The accused was also asked to allow them to take search of the body of his person and if

he wanted to have such search in the presence of any Gazetted Officer or Judicial Magistrate, the same could be done. The accused was not only informed orally but he was given in writing in hindi language. However, the accused said no to it and thereafter search of the body of his person was taken by the Police Inspector.

4. The said contraband article was thereafter got weighed by one Mr. Rameshbhai Gurumal Sindhi, PW – 3. He has also issued necessary receipt of weight. FSL officials were called for and from each slices, samples of 50 grams each were taken and after completing necessary formalities of seizure and sealing, the same was handed over to the responsible officer of the railway police station and a detailed panchnama in that regard was also drawn. Thereafter, the accused was arrested and a complaint was registered against the accused with the Vadodara railway police station for commission of offence under Section 8 (c), 20 (b) and 21 of the NDPS Act.

5. Pursuant to the registration of the offence, the investigation was put into motion. During the course of investigation, sample of the contraband article was sent to FSL for chemical analysis and on getting report from FSL to the effect that the contraband article was charas, the accused was charge-sheeted in the Court of learned Sessions Judge, Vadodara where it was registered as NDPS Case No. 04 of 1999.

6. The learned Sessions Judge, to whom the case was made over for trial, framed charge against the accused for commission of the offence punishable under Section 8 (c), 20 (b) and 21 of the NDPS Act, which was read over and explained to him. As the accused pleaded not guilty to the charge and claimed to be tried, he was put to trial in NDPS Case No. 04 of 1999.

7. In order to bring home the charge levelled against the accused, the prosecution has examined in all 11

witnesses and relied upon their testimonials, details of which are as under :-

P.W. 1 – Sobhana Jitendra Nanavala - Exh. 8.

P.W. 2 - Haribhai Ganpatrao Galphade - Exh. 10.

P.W. 3 – Ramesh Gurumal Sindhi - Exh. 12.

P.W. 4 – Sunil Khasia - Exh. 14.

P.W. 5 - Ashif Shaikh - Exh. 17.

P.W. 6 - Gajendrasinh Indrasinh - Exh. 21.

P.W. 7 - Kalidas Ambalal - Exh. 24.

P.W. 8 - Bhuvasaheb Pandorang - Exh. 26.

P.W. 9 - Balkeshwar Tiwari - Exh. 28.

P.W. 10- Gambhirsinh Javrajsinh - Exh. 31.

P.W. 11- Mobin Ismailkhan Pathan - Exh. 34.

8. To prove the culpability of the accused, prosecution has also produced several documents and relied upon the contents of the same, details of which are as under :-

| Sr. No. | Exh. No. | Type of evidence. |
|---|---|---|
| 01. | 09 | Report of Examination of Sobhanaben Nanawala, Scientific Officer of FSL, Surat. |

| Sr. No. | Exh. No. | Type of evidence. |
|---|---|---|
| 02. | 11 | Complaint. |
| 03. | 13 | Receipt given by Rameshbhai Sindhi about weight of alleged muddamal. |
| 04. | 15 | Writing passed by PI Pathan and allegedly signed by appellant – accused. |
| 05. | 16 | Panchnama. |
| 06. | 22 | Receipt of FSL Office. |
| 07. | 23 | Entry of Muddamal Register. |
| 08. | 25 | Order of PI for handing muddamal. |
| 09. | 27 | Order of investigation. |
| 10. | 29 | Forwarding letter of PI Balkeshwar Tiwari. |
| 11. | 30 | FSL Report. |
| 12. | 38 | Report of traffic Court. |
| 13. | 39 | Messanger to Controller |
| 14. | 40 | Yadi to FSL. |
| 15. | 41 | Ravnagi Noth. |
| 16. | 42 | Information to Superior Officer. |
| 17. | 43 | Muddamal sent to traffic court. |
| 18. | 44 | Yadi for analysis of muddamal *charas* to FSL. |

9. After recording of the evidence of the prosecution witnesses was over, the learned Sessions Judge explained the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as

required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution by reiterating that he has been falsely implicated. However, he did not lead any evidence nor did he examine any witness in support of his defence.

10. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the Sessions Court held that the complicity of the accused has been established as he was found with contraband article *charas* at Vadodara Railway station and during his search in the presence of panchas, the said contraband article was recovered which was weighed in presence of the panchas and after following necessary formalities envisaged under the NDPS Act, the samples were sent to the FSL for chemical analysis and the report of FSL in terms certified that the muddamal article sent for analysis was *charas* which is prohibited under Section 8 (c ) of the NDPS Act and commission of such offence is punishable under section 20 (b) of

the NDPS Act. The learned Sessions Judge, therefore, vide his judgment and order dated 20.05.2000 convicted the accused for commission of the offence punishable under Section 8 (c), 20 (b) read with Section 21 of the NDPS Act and sentenced him to suffer RI for ten years and fine of Rs.1 lakh and in default of payment of fine, SI for one year, which has given rise to the present Appeal at the instance of the accused.

11. Mr. B.M. Gupta, learned advocate appearing with Mr. D.P. Kinariwala, learned advocate appearing for the appellant – accused has submitted that the learned Sessions Judge has not considered and appreciated the contradictory evidence of prosecution witnesses and that there is no evidence to connect the appellant – accused with the alleged offence. The conscious possession of the contraband article by the appellant – accused is not proved beyond reasonable doubt. The statutory provisions contained in Section 41 (2), 42, 50 & 51 of the NDPS Act have not been complied with. The members of

the raiding parties were not empowered to carry out the search as there was neither any reason to believe nor any information pursuant to which they have undertaken the search of the accused. There is no positive evidence on the record of the Sessions Court that the alleged muddamal was in conscious possession of the accused and if such conscious possession is not proved beyond reasonable doubt, the conviction recorded against the appellant – accused cannot be said to be legal conviction and hence, such a conviction deserves to be quashed and set aside. There is no iota of evidence adduced by the prosecution that the alleged muddamal is capable of being intoxication and till it is proved, the appellant accused cannot be held guilty of commission of such offence under the Act. He has further submitted that the evidence of P.W. 1 – Shobhnaben Jitendra and her report Exh. 9 are not admissible as per the provisions contained in Section 45 of the Evidence Act as well as Section 293 (4) of the Criminal Procedure Code. As per her deposition, she is the Scientific Officer whereas the report is

required to be signed by the Director, Deputy Director or Assistant Director of Central Forensic Science Laboratory or a State Forensic Science Laboratory by any chemical examiner or Assistant chemical examiner. The main person who examined the contraband article has not been examined by the prosecution though cited as a witness in the charge-sheet in column No. 4. Shri R.M. Chaudhary whose report was supplied along with the charge-sheet papers has not been examined by the prosecution. His report has also not been proved according to law and the alleged contraband article was not identified by the person who received and analysed the same which was sent by the Police officials to the FSL Office. The sealing procedure was also not properly followed and there was all possibility of tampering the said article.

12. Based on the aforesaid submissions, Mr. Kinariwala has urged that the impugned judgment and order passed by the learned Sessions Judge is not sustainable and the appellant – accused is required

to be released forthwith.

13. Mr. K.T. Dave, learned Additional Public Prosecutor appearing for the respondent – State of Gujarat, on the other hand, submitted that by voluminous evidence produced by the prosecution, the complicity of the accused is proved beyond reasonable doubt. The accused was found at Vadodara railway station with the contraband article in his attache. He has further submitted that there was no violation of any statutory provision and all necessary compliances were made by the raiding parties and/or Investigating Agency and there was no substance in the argument that the provisions contained in Section 41 (2), 42, 50 & 51 of the Act were violated. The learned Sessions Judge has discussed all these issues raised before him and before this Court by the learned advocates appearing for the appellant – accused at length in the judgment and order and he has come to the right conclusion that there was no violation of any of these provisions. That the contraband article was found

from the possession of the accused at the time when the railway police was in round. It is a case of chance recovery and hence, there is no need to comply with the provisions contained in Section 41 (2) and 42 of the Act. Despite the fact that even the provisions contained in Sections 50 are not required to be complied with in the case of a chance recovery, still, the said provisions have been complied with. Mr. Dave has, therefore, submitted that the prosecution has clearly established beyond reasonable doubt the charge against the accused and he was found in conscious possession of the contraband article.

14. Mr. Dave has further submitted that it is true that the prosecution case is mainly based on the testimonies of the members of the raiding party consisting of the police officers and panch witnesses and there is no independent corroboration to support the prosecution version. However, absence of any independent corroboration and independent support would not render the prosecution version to be not

acceptable in light of the settled legal position. Even if the Panchas have not supported the prosecution version or have testified in a manner as would even contradict the prosecution version, then also, the Court can order conviction on the basis of the evidence of the police personnels led by the prosecution. Here in the present case, the panch witnesses have also supported the case of the prosecution. Since the prosecution has established by other believable, trustworthy and corroborative evidence, the charge against the accused has been proved beyond reasonable doubt. The documentary evidence on the record of the proceedings clearly establishes the involvement, presence and role of the accused in the offences charged with. Even if there is any discrepancy or contradiction, emanating from the testimonies of the prosecution witnesses, the same would not affect the case of the prosecution. From the documentary evidence on record, more particularly, the documents Exh. 9, 22, 23, 30, 41 & 42 are capable enough to prove charge against the accused. He has, therefore, submitted that the

impugned judgment and order does not warrant any interference by this Court in this appeal and further urged to dismiss this appeal.

15. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS cases, this court has examined the entire evidence on record for itself independently of the learned trial Judge and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the learned trial Judge has rightly recorded the order of conviction and sentence.

16. The Court is conscious of the fact that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

17. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Hon'ble Supreme Court in this regard, the Court has to find out as to whether in the present case, strict compliance of the safeguards provided under the statute have been observed by the Police Inspector during the course of search of the accused and seizure of the muddamal, contraband article, *charas* and the trial court has considered the evidence in proper perspective and rightly recorded the order of conviction and sentence.

18. In this connection, we shall first refer to the oral testimony of P.W.1 – Shobhnaben Jitendra. She is the witness from FSL office, Surat, Biology division. She received one gram charas for examination and examined the same on 18.01.1999. She has submitted her report at Exh. 9 and confirmed the necessary ingredients for the contraband article charas. P.W. 2 – Haribhai Ganpatrao Galphade is the complainant and PSI. Complaint is at Exh. 11. He has inter alia testified in his deposition the entire story of the prosecution which is briefly stated in the beginning of this judgment. P.W. 3 is Ramesh Gurumal Sindhi who has weighed the muddamal and issued the receipt of weight. P.W. 4 – Sunil Khasia is the panch witness who has testified that the key of bag was demanded from accused and the accused has denied. He has also given description of muddamal of sample. In his cross-examination also, he has stated that the accused was in custody and bag was lying on the table and the said bag was opened in his presence. He has also confirmed the

drawing of panchnama. P.W. 5 – Ashif Shaikh is the another panch witness and he has also supported the case of the prosecution. P.W. 6 – Gajendrasinh Indrasinh, Head Constable who has kept the muddamal with him. He received muddamal from PSO in a sealed condition on 02.01.1999. He noted the same in the register and kept it in safe custody. On 05.01.1999, he has handed over the muddamal sample packets to head constable Kalidas Ambalal for its delivery to the FSL. P.W. 7 – Kalidas Ambalal has received the muddamal for its delivery to the FSL. P.W. 8 – Bhuvasaheb Pandorang is the PSO at Vadodara railway police station. P.W. 9 – Balkeshwar Tiwari is Police Inspector. He is the successor Investigating Officer. He received the investigation papers from Police Inspector Mr. Pathan. He has also received the certificate of FSL and filed the charge-sheet. P.W. 10 is Gambhirsinh Javrajsinh is a member of the raiding party. He has confirmed that all muddamal packets were sealed.

19.A close scrutiny of the evidence of the prosecution witnesses in its entire width and breadth, the evidence is consistent to the effect that the accused was found with contraband article *charas* and in the presence of panchas and members of raiding party it was observed to this effect. From the perusal of the documents on record, it is evident that all the necessary formalities required under the Act have been duly complied with and necessary safe-guards enumerated under the Act have also been followed. Mr. Kinariwala has made an attempt to point out some discrepancies in the prosecution case. However, those discrepancies are very weak and are not at all fatal to the prosecution case. Therefore, we find no reason to discard the evidence of the prosecution witnesses and according to us, the complicity of the accused is proved beyond reasonable doubt.

20.On close scrutiny of the evidence on record, we find no infirmity in the findings, ultimate conclusion and

the resultant order of conviction and sentence recorded by the learned Sessions Judge. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence as according to us, no other conclusion is possible except the one reached by the learned Sessions Judge on the facts and in the circumstances of the case.

21. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the learned Sessions Judge is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we concur. We do not think it right to give further reasons then what has been given by the learned Sessions Judge in the impugned judgment and order.

22. In the above view of the matter, we are not inclined to interfere in the order and judgment of the learned Sessions Judge, Vadodara, to undergo R.I of 10 years

and fine of Rs.1 lac and in default of payment, to undergo S.I. for one year.

23. In the above view of the matter, the present appeal filed by the accused is dismissed. The conviction and sentence imposed on the accused is confirmed.

[A. M. KAPADIA, J.]

[K.A. PUJ, J.]

S*avariya*